UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VALVTECHNOLOGIES, INC., *Plaintiff*,	§	
	§	
vs.	§	CIVIL ACTION H-04-3628
	§	
VOLK UNIONTECH, INC., *et al.*, *Defendants*.	§	

MEMORANDUM AND RECOMMENDATION

Before the court is a motion to dismiss on the grounds of *forum non conveniens* by defendants Volk Uniontech, Inc., LAD, Inc., and Hai Wu (Dkt. 49). A hearing on this motion was held August 4, 2005. For the reasons set forth below, the court recommends this motion be granted.

Background

Plaintiff Valvtechnologies, Inc. (VTI) brings this suit against defendants Volk Uniontech, Inc., LAD, Inc., Hai Wu, Scot Hsia, and Xu Ling Yun (a.k.a. Lingyun Xue),[1] for unfair competition in violation of federal and common law, as well as other unspecified misconduct. *See* Dkt. 23. Jurisdiction is premised on a federal question arising under the Lanham Act, 18 U.S.C. §§ 1121, 1125.

VTI is a Texas corporation that manufactures valves. It has an office in Shanghai, China. LAD, a Chinese company which also produces valves, was a sales

[1] Scot Hsia and Xu Ling Yun were added as defendants in VTI's amended complaint. *See* Dkt. 23.

representative for VTI in China pursuant to an agency contract between the companies. Wu is the president and principal shareholder of LAD, as well as the president of Volk, a company with a manufacturing facility in Houston, Texas. Hsia is a director and part-owner of Volk. Xu Ling Yun owns an interest in LAD.

VTI alleges that LAD and Wu made false and misleading statements about VTI to its customers. This, it says, harmed its business and reputation. In particular, VTI claims that Wu falsely intimated to VTI's customers that VTI and Volk are the same company or affiliated companies, and also suggested that VTI's valves were not of premium quality. VTI's only well-defined allegation, however, is that the defendants transmitted a facsimile falsely purporting to be from Alison Crowley to a prospective customer, Shenhua Project Department. *See* Dkt. 23, Ex. B. Crowley is the marketing coordinator of VTI, but the facsimile suggests she is an employee of "VOLK VALVE Beijing office." *Id*. In the words of VTI, the "[f]iling of this lawsuit was triggered by defendants' sending a misleading telefax to a mutual prospective Chinese customer wrongfully and intentionally misidentifying Ms. Crowley as their employee/Beijing office manager [when in fact Crowley was solely an employee of VTI in its Houston marketing department]." Dkt. 53, at 6. VTI also makes much of the facsimile's statement that Volk has one of the six largest valve factories in the

United States, but it is not clear why this claim, even if untrue, is of any particular significance, or why it so excites VTI's indignation.

In an affidavit submitted by Wu, he asserts the facsimile was generated by Yang Chenhai (also referred to by the parties as "Chenhia"), an independent sales agent. *See* Dkt. 30. Chenhai's name is on the facsimile. *See* Dkt. 23, Ex. B. The defendants do not dispute that Chenhai is an agent of LAD or that they are responsible for actions he took within the scope of the agency relationship. Notwithstanding this facsimile, VTI was the successful bidder on the Shenhua Project, not LAD or Volk, so VTI's damages claim is based upon injury to reputation, rather than lost profits on this contract.

The task for the court is not to determine the merits of this case, but rather to decide where it is best presented: in Texas, or an alternative judicial forum in China? Defendants Volk, LAD, and Hai Wu have brought this question to the court by filing a motion to dismiss invoking the principles of *forum non conveniens*.[2] *See* Dkt. 49. They argue the People's Republic of China is a more convenient forum because the central event of this litigation occurred there, i.e., the facsimile was sent in China to a prospective Chinese customer; nearly all principals involved in this litigation are

[2] Scot Hsia, and Xu Ling Yun have not explicitly joined in the motion to dismiss, but there is no reason to believe either one objects to it. Hsia has submitted an affidavit with the motion to dismiss agreeing to submit to Chinese jurisdiction should the case be dismissed, and his counsel indicated at the hearing that Hsia has no objection to the case being tried there. *See* Dkt. 49, Ex. 1. As for Xu Ling Yun, he has not been served with VTI's complaint.

Chinese citizens; and most of the potential witnesses are in that country. *See* Dkt. 49. The defendants also maintain dismissal is proper because China has jurisdiction to hear the suit; they have agreed to submit to that jurisdiction should this case be dismissed; compulsory attendance of these witnesses is available in China, while unavailable to an American court; China has a compelling interest in determining the parties' rights; and China's laws will control the disposition of this case. *See id.*

VTI opposes the motion to dismiss on a numbers of grounds. They counter that: (1) China is an inadequate forum because it has a poor history of enforcing intellectual property rights, does not provide for equivalent pre-trial discovery, and does not grant the right of trial by jury; (2) the defendants may be unfairly competing against it with prospective customers all over the world, not just those in China; (3) Volk has a manufacturing plant in Houston, Texas, and so Houston is a convenient forum for this defendant; (4) a pivotal witness–Alison Crowley–is located in Houston; (5) dismissal to China would increase VTI's costs and burdens of litigation; (6) VTI should enjoy the presumption of its choice of forum; and (7) the defendants have waived the right to challenge the suitability of this forum by waiting several months to file the motion and by participating in litigation during that time. *See* Dkt. Nos. 48, 53, 57.

Analysis

The court has the discretion to grant or deny a motion to dismiss under the doctrine of *forum non conveniens*.[3] *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981). The doctrine enables the court to decline to exercise its jurisdiction if the moving party establishes that the convenience of the parties and the court, and the interests of justice, indicate the case should be tried elsewhere. *See Karim v. Finch Shipping Co., Ltd.*, 265 F.3d 258, 268 (5th Cir. 2001). The primary purpose of the doctrine is to allow a court to resist impositions upon its jurisdiction and to protect the interests of parties to the litigation by adjudicating the claim in the most suitable and convenient forum. *See Nolan v. Boeing Co.*, 919 F.2d 1058, 1070 (5th Cir. 1990), *cert. denied*, 499 U.S. 962 (1991).

To obtain a dismissal based on *forum non conveniens*, a defendant must demonstrate: (1) an available and adequate alternative forum in which to try the case; and (2) a balance of relevant private and public interest factors favoring dismissal. *See Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 671 (5th Cir. 2003); *McLennan v. American Eurocopter Corp., Inc.*, 245 F.3d 403, 424 (5th Cir. 2001). An alternative forum is considered "available" if the entire case and all parties can

[3] *Forum non conveniens* is "[t]he doctrine that an appropriate forum–even though competent under the law–may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place." BLACK'S LAW DICTIONARY 680 (8th ed. 2004).

come within its jurisdiction. *Vasquez*, 325 F.3d at 671. An alternative forum is "adequate" if the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court. *Id.*; *see also Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 379-80 (5th Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003).

Assuming there is an adequate alternative forum, the court next considers whether the relevant private and public interest factors weigh in favor of that other forum. Unless these factors strongly favor the defendants, the plaintiff's choice of forum should not be overturned because it is entitled to great weight. *See Reyno*, 454 U.S. at 255; *see also Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 342 (5th Cir. 1999). Thus, the burden of demonstrating *forum non conveniens* rests with the defendants. *See Robinson v. TCI/US West Communications, Inc.*, 117 F.3d 900, 907 (5th Cir. 1997).

With these principles in mind, the court concludes that China is the more convenient and suitable forum for this litigation, and this case is therefore better tried in that country.

I. China is an Available and Adequate Alternative Forum

There is little dispute China is an available alternative forum where the entire case can be heard and where all the parties can come within its jurisdiction. The

defendants have filed affidavits indicating that they will submit to the jurisdiction of the courts of the People's Republic of China.[4] If a defendant agrees to submit to the jurisdiction of the alternative forum, then that the alternative forum is available for the purposes of *forum non conveniens*. *See Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1245 (5th Cir. 1983); *see also Gonzalez,* 301 F.3d at 380 n.3 ("It is undisputed that Mexico is an amenable forum because the defendants have agreed to submit to the jurisdiction of the Mexican courts"); *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 221 (5th Cir. 2000) (foreign forums were available in large part because the defendants agreed to submit to the jurisdiction of those forums). If the defendants later renege on this agreement, VTI will be allowed to reinstate its claim in the Southern District of Texas, because a dismissal under *forum non conveniens* must be granted conditionally, with allowance for return should the condition not be satisfied. *Cf. Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 675 (5th Cir. 2003) (a return jurisdiction clause remedies the problem of defendants not submitting to the jurisdiction of a foreign forum by permitting a return to the dismissing court should the lawsuit become impossible in the foreign forum). The defendants may also be required to waive other jurisdictional defenses or statute of

[4] *See* Dkt. 49, Ex. 1, 2 (Affidavits of Scot Hsia and Hai Wu).

limitation defenses they may have in China as a condition for dismissal. China is therefore an available alternative forum where this case may be tried.

The adequacy of China as alternative forum, however, is vigorously disputed by VTI. They marshal three points on the shortcomings of a Chinese forum: (1) China has a poor history of enforcing intellectual property rights; (2) it does not provide for equivalent pre-trial discovery; and (3) it does not provide for trial by jury.

The third point about lack of trial by jury is undisputed. It does not, however, make the foreign forum inadequate. As explained by the court in *Magnin v. Teledyne Cont'l Motors*, 91 F.3d 1424, 1430 (11th Cir. 1996):

> 'jury trials are almost always available in the United States, while they are never provided in civil law jurisdictions,' and '[e]ven in the United Kingdom, most civil actions are not tried by a jury.' Yet, there are numerous decisions dismissing cases in favor of a civil law jurisdiction forum, and in favor of the United Kingdom as a forum.

(quoting *Reyno*, 454 U.S. at 252 n.18).

With respect to the second, the court recognizes the Chinese system of pre-trial discovery may not be as comprehensive or as broad as that provided by an American court. *See, e.g., Malaysia Int'l Shipping Corp. Berhad v. Sinochem Int'l Co. Ltd.*, 2004 WL 503541, at *10 (E.D. Pa. 2004) (acknowledging the Chinese system of discovery may not be as broad or effective as the American system, but adding "we have no reason to doubt the competence and justness of the system the Chinese courts

do have in place"). The People's Republic of China is a sovereign nation. That it has a different system of pre-trial discovery more limited than that prevailing in U.S. courts is not a reason to hold that China's courts are inadequate to resolve this matter. *Cf. Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 381-82 (5th Cir. 2002).

And while VTI would have the court review China's record on protecting intellectual property rights and declare it wanting, there is little reason to even broach this topic. VTI is not claiming that the defendants stole the designs of its valves; it claims that the defendants disparaged the quality of its valves and attempted to unfairly lure away its customers. If there is a copyright claim being asserted in this case, the court is unable to discern it. Therefore, VTI's charge about China not adequately protecting intellectual property rights appears misplaced, even if true.

In any event, VTI's cited concerns miss the mark. The Supreme Court has instructed that "The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981). And the Fifth Circuit has further clarified that "A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court." *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 221 (5th Cir. 2000); *In re Air Crash Disaster Near New*

Orleans, La., 821 F.2d 1147, 1165 (5th Cir. 1987) (*en banc*) (vacated and remanded on other grounds). It is only when "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all [that] the unfavorable change in law may be given substantial weight." *Reyno*, 454 U.S. at 254. This exception is present only "[i]n rare circumstances." *Id.* at 254 n.22; *see also Lu v. Air China Int'l Corp.*, 1992 WL 453646, at *2 (E.D.N.Y. 1992).

Most importantly though, the record before the court does not suggest VTI will be precluded from pursuing any of its claims against these defendants in China. The defendants have submitted affidavits from an attorney licensed in the People's Republic of China that there is a Chinese unfair competition law providing a cause of action for the very wrongs complained of by VTI.[5] *Cf. Lu*, 1992 WL 453646, at *1 (finding China an adequate available forum in part because the defendant submitted an affidavit from a Chinese attorney that China would entertain the cause of action). In particular, the People's Republic of China adopted an "Anti-Unfair Competition Law" in 1993, prohibiting business operators from "advertising or by any other means creat[ing] misleading or false publicity, in respect of the quality, manufacturing components, functions, uses, producer, period of validity, place of origin, etc., of products." Dkt. 49, Ex. 4. This law also declares "[b]usiness operators

[5] *See* Dkt. 49, Ex. 4, 5.

may not fabricate and/or spread false facts, thereby injuring the goodwill of competitors or the reputation of their products." *Id*. Thus, while VTI may not enjoy exactly the same legal protections an American court would provide in terms of discovery, or a jury trial, or even enforcing intellectual property rights, VTI will not be deprived of all potential remedies should this matter be heard in China rather than Texas.

Moreover, the court has not unearthed any authority that other American courts have found China to be an inadequate forum under the principles of *forum non conveniens*. *Cf. Malaysia Int'l Shipping Corp. Berhad v. Sinochem Int'l Co. Ltd.*, 2004 WL 503541, at *10 (E.D. Pa. 2004) (granting a motion to dismiss under *forum non conveniens* in favor of a Chinese court); *Lu v. Air China Int'l Corp*., 1992 WL 453646, at *1 (E.D.N.Y. 1992) (finding China to be an adequate forum). Accordingly, the court finds China to be both an adequate and alternative forum for this litigation.

II. The Balance of Private Interests Favors Dismissal

Once a court determines there is an adequate alternative forum, it next balances the relevant private interest factors. Private interest factors include:

> the relative ease of access to sources of proof; the availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; the possibility of view of

> premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, 672 (5th Cir. 2003) (citation omitted).

These private interest factors clearly favor dismissal to China. The facsimile, written in Chinese, was sent to a prospective Chinese customer. There is every indication the fascimile also originated in China, and was sent by a Chinese individual–Yang Chenhia. The facsimile was a supplement to Volk's bid on a contract to sell valves in China. The alleged damage to VTI's reputation and its business was in relation to sales of its valves in that country. While VTI claims "[i]t is highly likely that [the defendants] are committing their wrongful deeds throughout the world," the only wrongful deed specifically mentioned by VTI is the sending of this one facsimile. Dkt. 48. VTI also maintains that it may have lost reputation in the eyes of prospective customers throughout the world, not just those in China, but again, the only affected customer identified by VTI is Shenhua Project Department, a Chinese entity. Moreover, the agency contract that VTI alleges was breached was

with LAD, a Chinese company, and was an agreement for LAD to promote and sell VTI's valves in China.[6]

Thus, China is undoubtedly the focal point of this litigation and will provide better overall access to any sources of proof needed in this case, as nearly all documents and potential witnesses are located there. For instance, Wu is a Chinese citizen.[7] Yang Chenhai is the person that apparently sent the facsimile; Aishe Li is the man who received it; Li reported the transmission to Lily Zhang. Li, Zhang, and Chenhai are in China. *See* Dkt. Nos. 1, 16, 30. These witnesses can be compelled to testify in China. The defendants have submitted an affidavit from an attorney licensed in China stating China provides for compulsory process for attendance of unwilling witnesses.[8] *See* Dkt. 49, Ex. 5. On the other hand, an American court will generally not have the authority to compel Chinese citizens to testify in Texas. *See, e.g.*, FED. R. CIV. P. 45 (unless otherwise provided by statute, a court's subpoena power is geographically limited); *see also Air Turbine Tech., Inc. v. Atlas Copco AB*, 217 F.R.D. 545, 546 (S.D. Fla. 2003) (citing *Gillars v. United States*, 182 F.2d 962,

[6] At the motion hearing, VTI indicated that it would not be pursuing the breach of contract claim, but it has not formally withdrawn this portion of its complaint.

[7] VTI claims that Wu is a resident of Houston, Texas, but a photocopy of his passport shows him to be a Chinese citizen. *See* Dkt. 30. Wu has a visa to travel to the United States, but it is unclear how substantial a connection Wu has to this country, other than owning a sizeable interest in a company with facilities in Houston, Texas.

[8] Article 70 of the Rules of Civil Procedure of the People's Republic of China states that "All units and individuals who have knowledge of a case shall be under the obligation of giving testimony in court." Dkt. 49, Ex. 6.

978 (D.C. Cir. 1950), for the proposition that aliens who are inhabitants of a foreign country cannot be compelled to respond to a subpoena). It is true that one of the primary witnesses in this matter is Alison Crowley, who is located in Texas. But Crowley is a VTI employee. VTI should have little difficulty in securing her testimony. Most other relevant witnesses, however, are located in China, and there is no mechanism for compelling their testimony should they not be willing to offer it voluntarily. And other than Crowley, VTI has identified no individual in the United States from whom depositions or trial testimony would need to be taken. VTI suggests that it may need to depose those persons responsible for advertising and marketing for LAD and Volk, but acknowledges these individuals are as likely to be in China as the United States. Additionally, VTI has not specified any documents pertaining to the facsimile claim that are located in the United States rather than China. The language barrier, for both documents and witnesses, will be greater in Texas than in China.

One of the defendants, Volk, does have a manufacturing facility in Texas, and therefore litigation in Texas would not prove especially burdensome to it. But the force of this logic cuts the other way as well. VTI has an office located in China, so its complaints about the inconveniences of facing trial there are less than compelling. If this were a question of personal jurisdiction, it could safely be said that VTI could

reasonably anticipate being haled into court in China. The opposite is likewise true. VTI should reasonably anticipate being redirected to find relief in a Chinese court for business disputes occurring there under the principles of *forum non conveniens*. In sum, the balance of private interest factors heavily tilt the scale in favor of a Chinese forum.

As a fallback argument, VTI also contends the defendants have waived their right to contest the suitability of this forum by implicitly submitting to the court's jurisdiction and by voluntary participating in this litigation for several months. *See* Dkt. 48. VTI argues this implicit submission was demonstrated by the defendants filing an answer to VTI's complaint; participating in the joint discovery/case management plan; filing disclosures; filing an appearance of counsel; and by other similar participation in this litigation. *See id*.

VTI's waiver argument is unpersuasive. The "implicit submission" contention is seriously undercut by the defendants' repeated and explicit challenges to the court's jurisdiction, beginning with the defendants' first substantive response to VTI's complaint. Furthermore, the defendants have been "voluntarily" litigating in this court only in the sense of opposing VTI's discovery motions, hardly a pronounced indication of consent. And finally, there is nothing particularly untimely about the defendants' motion. The defendants made clear they were going to seek dismissal

under *forum non conveniens* from the time of their first substantive filing. *See* Dkt. 15, Def.'s Answer (filed December 22, 2004). As VTI itself points out, the defendants reiterated their intent to file a motion to dismiss at the scheduling conference held on January 20, 2005. *See* Dkt. 48. Thereafter, the defendants submitted their first motion to dismiss on May 25, 2005. *See* Dkt. 35. Under the Rule 16 scheduling order, the defendants had until October 17, 2005, to file dispositive and non-dispositive motions. *See* Dkt. 20. The timing of the defendants' motion to dismiss is therefore well within the deadlines set by the court, and does not support a finding of waiver by implicit submission.

III. The Balance of Public Interests Favors Dismissal

If the private interest factors weigh in favor of dismissal, no further inquiry is necessary; only if the court cannot determine whether the private interest factors weigh in favor of dismissal on *forum non conveniens* grounds is the court required to examine the public interest factors at all. *See Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1550-51 (5th Cir. 1991), *cert. denied*, 502 U.S. 963 (1991). Nevertheless, for the sake of thoroughness, the court will examine these factors as well.

The relevant public *forum non conveniens* factors for the court to reflect upon are:

> administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, 673 (5th Cir. 2003) (citation omitted).

The first factor is of minimal import. The scope and complexity of this case is certainly not "reminiscent of that mythical monster," the hydra, that inspired the literary flourishes in *Syndicate 420 at Lloyd's London v. Early Am. Ins. Co.*, 796 F.2d 821, 831 (5th Cir. 1986) (dealing with at least forty-five insurers and litigation involving "many claims, permutations and parties"). The administrative burden of this relatively straightforward dispute will also be no greater on a court in China than on a court in Texas. *Cf. Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 343 (5th Cir. 1999).

As to the second factor, Texas does have an interest in hearing a case brought by one of its corporations, but China's stake in this case is much more significant because of its interest in regulating business activities by Chinese citizens within its

boundaries. *Cf. Delta Brands Inc. v. Danieli Corp.*, 99 Fed. Appx. 1, 10 (5th Cir. 2004) (unpublished).

Turning to the third grouping of public interest factors, the choice of law and the potential application of foreign law to VTI's claims should not prove problematic for a Chinese court. VTI has indicated that it does not intend to pursue its common law breach of contract claim. VTI's unfair competition claim is based on conduct occurring in China, between Chinese citizens, employing the Chinese language, involving a bid on a Chinese construction project. Pursuing such a claim under federal law in a U.S. court raises a potential difficulty that neither party has addressed: the extraterritorial application of the Lanham Act to foreign defendants for activities outside the United States. The Lanham Act may, in some circumstances, be applied to reach the extraterritorial conduct of Americans abroad. In *Steele v. Bulova Watch Co.*, 344 U.S. 280, 281 (1952), the Supreme Court held that "a United States district court has jurisdiction to award relief to an American corporation against acts of trade-mark infringement and unfair competition consummated in a foreign country by a citizen and resident of the United States." Although another circuit court has declared that the Lanham Act also may be applied to the foreign

activities of foreign defendants in appropriate cases,[9] the Fifth Circuit has stated (in dicta) that "The [Lanham] Act does not, however, apply extraterritorially to foreign nationals." *Boureslan v. Aramco*, 857 F.2d 1014, 1029 (5th Cir. 1988). While the citizenship of Volk is in question, the balance of the defendants are Chinese. But even if the Lanham Act does reach the conduct of the remaining defendants, the broader point to be made is that "an attempt to regulate the conduct of foreign nationals presents the most serious affront to the sovereignty of other nations" and should be avoided when possible. *Id.*

Finally, it would be unfair to burden Texas citizens with jury duty because this is basically a dispute centering in China. Thus, public factors strongly reinforce the conclusion that China is the more appropriate forum for this case.

Conclusion

Accordingly, the court recommends that the defendants' motion to dismiss be granted subject to the following conditions:

1. Within ninety days of the entry of the order to dismiss, VTI may file a lawsuit in an appropriate court in China;
2. The defendants will submit to the jurisdiction of that court;

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[9] *See McBee v. Delica Co., Ltd.*, — F.3d —, 2005 WL 1805186, at *9 (1st Cir. 2005) (citing *Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 746 (2d Cir. 1994) and *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 429 (9th Cir. 1977) to buttress the claim that "it is beyond doubt that the Lanham Act can be applied against foreign corporations or individuals in appropriate cases; no court has ever suggested that the foreign citizenship of a defendant is always fatal").

3. The defendants will waive any jurisdictional defenses or any defenses premised upon the statute of limitations;
4. The defendants will make available in those proceedings all relevant documents and witnesses within their control; and
5. The defendants will make available any discovery materials produced in this action.

The case should be administratively closed, but the court should retain jurisdiction to allow VTI to reinstate its claim should the defendants not comply with these conditions.

The parties have ten days to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. P. 72.

Signed on August 9, 2005, at Houston, Texas.

Stephen Wm Smith
United States Magistrate Judge